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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [redacted] Office: Los Angeles Date: MAR 11 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

ON BEHALF OF APPLICANT: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Los Angeles, California, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on January 30, 1964, in Iran. The applicant's father, [redacted] was born in Iran in January 1938 and became a naturalized U.S. citizen in 1985. The applicant's mother [redacted] was born in January 1946 in Iran and became a naturalized U.S. citizen on July 1, 1977, under the name of [redacted] The applicant's parents married each other on April 4, 1963, and were divorced on January 10, 1966. The applicant became the beneficiary of an approved Petition for Alien Relative filed by his U.S. citizen step-mother and was lawfully admitted for permanent residence on February 17, 1980, as an IR-2 immigrant to live with his father and U.S. citizen step-mother when he was 16 years old. The applicant seeks a certificate of citizenship under section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432.

The district director reviewed the applicant's immigrant visa file which contains a sworn affidavit from his father dated December 21, 1979. The applicant's father states in that document that "according to Iranian Jewish custom, the custody of his son, Nasser, was given to him" (the father). The district director denied the application after concluding that the applicant was not in the legal custody of the naturalizing parent, the applicant's mother.

Section 321 of the Act was repealed on February 27, 2001. An applicant who was over the age of 18 on that date is ineligible to obtain the new benefits of the Child Citizenship Act (CCA) of 2000, Pub.L. 106-395, which allows for the naturalization of "at least one parent" to suffice while the child is under the age of 18. The provisions of the CCA are not retroactive. *Matter of Rodriguez-Trejedor*, 23 I&N Dec. 153 (BIA 2001). However, as noted in the publication of the interim rule implementing the CCA, all persons who acquired citizenship automatically under former section 321 of the Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time.

Section 321(a) of the Act in effect prior to being repealed, provides that a child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (3) The naturalization of the parent having legal custody of the child when there has been a legal

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> separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
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> (4) Such naturalization takes place while said child is under the age of 18 years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

In *Matter of Fuentes*, 21 I&N Dec. 893 (BIA 1997), the Board stated the following: "Through subsequent discussions, [the interested agencies] have agreed on what we believe to be a more judicious interpretation of section 321(a). We now hold that, as long as all the conditions specified in section 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

Legal custody of a child as an element of derivation contained in the 1940 statute, and in the present law, may follow judicial proceedings which either terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes, provided that the required "legal separation" of the parents has taken place. See INTERP § 320.1(a)(6).

The record establishes that the applicant's father became a naturalized U.S. citizen in 1985 when the applicant was 21 years old. Prior to the applicant's 18th birthday, the applicant was issued an immigrant visa on January 11, 1980, to travel to the United States and reside at [redacted] the residence of his father and step-mother. Prior to immigrating, the applicant had been residing in Jerusalem, Israel. Although the applicant's mother naturalized in 1977 when the applicant was 13 years old, he was not residing with her in her legal custody. The mother's Bureau file reflects that she was residing in Los Angeles, California, when she naturalized in 1977.

The applicant stated on June 23, 1994 (on page 39 of the transcript during his hearing) that he left Iran for the first and only time in the summer of 1969 when he was five years old. The applicant

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stated that he went to live in Long Island, New York. The applicant indicated on his immigrant visa application that he was present in the United States from August 15, 1969 to September 3, 1979, on a B-2 visa. There is no evidence to support that assertion in the record. The applicant has not shown whether he remained in the United States for the entire 10-year period as a nonimmigrant or whether he traveled back and forth from some other location such as Israel.

Affidavits from the applicant's stepmother indicate that she married the applicant's father and the applicant lived with them until 1980. According to the applicant's visa application, he was a student and living at the Israel Goldstein Youth Village in Jerusalem. The applicant's stepmother also states that the applicant's mother shared custody of the applicant, spent much time with him and was involved in decisions about his well-being.

Other affidavits from a former Rabbi of Tehran, states that the outcome of the parent's divorce was such that both parties were given custody of their only son, Nasser Lavi.

The parent's divorce decree fails to appoint custody of the applicant to either parent. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes.

The record is devoid of information regarding the applicant's actual residence in the United States during this period of time. The record does contain one letter from the Principal of Walt Whitman School dated December 21, 1979, in which she states that the applicant was a former student. There are no other school records relating to the applicant to ascertain how long he attended school, his address at that time and which parent or guardian was responsible for him. It must be noted that the applicant's father did not immigrate until July 1975 and his mother became a lawful permanent resident on November 24, 1970, and a naturalized citizen in 1977. The applicant's mother has resided in California since her initial admission in October 1966 as a nonimmigrant visitor.

The record indicates that the applicant attended Chapparel High School in Las Vegas, Nevada in 1982 and he listed his address as Kaneohe, Hawaii. He does list California addresses but all are after 1977 when his mother naturalized. The record is replete with documentation relating to his criminal activities, which is not germane.

The record is devoid of information regarding the applicant's U.S. residential addresses between 1969 and 1979, or where he went to school other than in Israel, or the addresses of his mother during that time period. The father's sworn statement dated December 21, 1979, that according to Iranian Jewish custom the custody of the applicant was given to the father is clearly contradicted on appeal by the testimony of Rabbi David Shofet, previously a Rabbi of

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Tehran, who authoritatively states that the outcome of the divorce was such that both parties were given joint custody of the applicant.

Nevertheless, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes. The record clearly supports a finding that the applicant was in the legal custody of his father when his mother naturalized in 1977. Therefore, he did not automatically acquire U.S. citizenship through his father's naturalization as he was 21 years old. Therefore, the district director's decision will be affirmed, and the appeal will be dismissed.

ORDER: The appeal is dismissed.